No. 3934.

UNITED STATES CIRCUIT COURT OF APPEALS 6 FOR THE NINTH DISTRICT

ONE BIG SIX STUDEBAKER AUTOMOBILE, TOOLS AND ACCESSORIES, AND HARVEY NOBLE,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF APPELLANT

FREEMAN, THELEN & FRARY,

Solicitors for Intervenor and Appellant.

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STATEMENT OF FACTS.

This action was brought in the District Court of the United States for the District of Montana by the United States of America, as Libelant, against One Big Six Studebaker Automobile and Accessories and Harvey Noble, as Libelees.

Prior to the commencement of this action, an information was filed on November 22nd, 1921, under the National Prohibition Act against Harvey Noble in the same Court, charging the said Harvey Noble with transporting intoxicating liquors without a permit or making a record thereof. (See Trans. p-32.) Shortly thereafter

on November 26th, 1921, this libel of information was filed under Section 3450 of the Internal Revenue Laws, against One Big Six Studebaker Automobile, Accessories and Harvey Noble. (See Trans. p-32.) A petition in Intervention together with answer was filed on behalf of Charles Zuckerman (see Trans. p-17), claiming the said Big Six Studebaker Automobile under a chattel mortgage by reason of the failure of the said Harvey Noble to perform the conditions of the said chattel mortgage given by him to the said Intervenor.

On March the 6th, 1922, the trial of Harvey Noble was had and the jury returned a verdict "not guilty" (See Trans. p-57). Subsequently, thereto, on March 14th, 1922, a supplemental answer was filed by the Intervenor, Charles Zuckerman, setting forth as a defense in this action the acquittal of Harvey Noble (See Trans. p-24).

It was stipulated at the beginning of the trial of this action that it was to be tried upon the evidence in the criminal action of the United States of America vs. Harvey Noble, supplemented by such additional proof as either side wish to introduce (See Trans. p-22). A motion was made (See Trans. p-58) on behalf of the defendant and intervenor that this action be dismissed on the ground that Section 3450 of the Internal Revenue Laws had been repealed by the Eighteenth Amendment to the Constitution,

commonly known as the National Prohibition Act, and also on the further ground that the judgment of acquittal in the case in which United States of America was plaintiff and Harvey Noble, Defendant, was a bar to this action, the same facts and circumstances and all matters connected with that case being the same as in this case. The Court denied the motion at the time and subsequently after all evidence was submitted took the same under advisement and thereafter decreed that the car be forfeited (See Trans. p-77), from which decision, this appeal has been taken.

ASSIGNMENT OF ERRORS.

1. That the Court erred in not sustaining the motion of the defendant and intervenor for dismissal of the above-entitled action on the ground that the acquittal of Harvey Noble, defendant, in the case of the United States of America, Plaintiff, vs. Harvey Noble, Defendant, action No. 3926 in the above entitled Court, was and is a complete bar to the action brought by the United States Government against the above-named defendant and intervenor and libelees in the above-entitled case.

2. That the Court erred in not abiding by the verdict of acquittal of the jury in the criminal action of the United States of America, Plaintiff, vs. Harvey Noble, Defendant, as the basis for his decision in the above entitled cause.

3. That the Court erred in not rendering and entering judgment in favor of the defendant and intervenor and libelees and against the libelant in the above entitled case.

4. That the Court erred in not rendering and entering judgment in favor of the libelees and against the libelant in the above-entitled case.

5. That the Court erred in not holding that the verdict of acquittal of the libelee, Harvey Noble, in the case of the United States of America, Plaintiff, vs. Harvey Noble, Defendant, action No. 3926 in the above entitled Court, was not a complete bar to the above-entitled action.

6. That the Court erred in holding that the said Big Six Studebaker Automobile, Tools and Accessories were subject to confiscation in the above-entitled action under the laws of the United States.

7. That the Court erred in not sustaining the motion of the defendant and intervenor for dismissal of the above-entitled action on the ground that Section 26 of the Volstead Act did repeal Section 3450 of the Internal Revenue Laws and that the Court had no jurisdiction to try the above-entitled cause.

8. That the Court erred in holding that he had jurisdiction to try the above-entitled cause and that Section 26 of the Volstead Act did not

repeal Section 3450 of the Internal Revenue Laws.

9. The Court erred in not holding that under the facts in this case as set forth in the Court's opinion, that Section 3450 of the Revised Statutes was not superseded by the National Prohibition Act, in that the Court found that the whiskey that the automobile in question was used to remove, was Canadian whiskey and gin.

10. The Court erred in not holding that the whiskey and gin removed in said automobile, if at all, had not been manufactured in an industrial plant, and therefore, not taxable until Title 3 of the National Prohibition Act.

11. The Court erred in not holding that the facts of this particular case show a violation of the National Prohibition Act and arose solely thereunder, if at all.

ARGUMENT OF APPELLANT.

Discussing errors one, two, three, four and five to the effect that the Court erred in not sustaining a motion of the defendant and intervenor for dismissal of the above-entitled action on the ground that the acquittal of Harvey Noble, defendant in the case of United States of America, Plaintiff, vs. Harvey Noble, Defendant, action 3926 in the above-entitled Court was and is a complete bar to this action brought by the United States Government against the

above-named defendant and Intervenor and libelees in the above entitled case.

If the action concerning the forfeiture of the Studebaker Car and Accessories had been brought under the Volstead Act, there could be no question as to the outcome, since the conviction of the person arrested is the controlling feature to enable the Government to sell a car as was held in United States vs. Slusser 270 Fed. 821 where the Court says:

> "The seizing officer is to have the vehicle in possession on the day of the trial of the person arrested to abide the judgment in the same proceeding. Should the defendant be acquitted, the automobile must be released for it is only upon conviction that a sale may be ordered."

Section 26, Title 2, of the Volstead Act, the following statement is found:

> "The Court upon *conviction* of the person so arrested, shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, order the car to be sold."

Again, in United States vs. One Cadillac Touring Car 274, Fed. 472, the Court says:

> "That upon the conviction of the person so arrested, the Court shall order a public sale of the property so seized unless good cause to the contrary is shown by the owner. This being a special statutory proceeding, the procedure thus prescribed must of course be strictly followed. It seems clear that the section in question contemplates and requires as a prerequisite to the sale of property seized, a judicial determination that such property

has been used in violation of the law. Considering the reference to the person discovered in the act of violating the law, to the 'person in charge,' who is to be arrested, to the 'person arrested,' who is to be prosecuted, to the day of trial' and to the order of sale, which is to be made by the Court 'upon the conviction of the person so arrested.' I reach the conclusion that the statute requires a jurisdictional basis for the sale in question, a conviction of the person so arrested, and that until such conviction, the Court cannot order such sale by virtue of any authority conferred by said section."

United States vs. One Buick Roadster 276 Fed. 407
United States vs. Slusser (D. C.) 270 Fed. 818
United States vs. One Stephens Automobile (D. C.) 272 Fed. 188.

So it is quite apparent that if the action concerning the forfeiture of the car was brought under the Volstead Act, the Court would be bound by the provisions of that act which would necessitate a conviction of the person criminally charged with transportation before the car can be forfeited to the State to be sold on sale.

If both the criminal action and the action *in rem* against the car had been brought under the Internal Revenue Act, the case of Coffee vs. United States 29 Law Ed. 681 would be conclusive. In that case the defendant was charged with attempting to defraud the United States of a tax on distilled spirits and was acquitted in the said action. In a subsequent action *in*

rem for the forfeiture of certain vessels and containers used in the manufacturing of the distilled spirits by the said defendant, the Court said:

"The existence of the same act or fact is involved as in the criminal prosecution, is in issue as a cause for the forfeiture of such property, the judgment of acquittal in conclusive in favor of the defendant, as claimant of the property involved in the subsequent suit *in rem*. Yet where an issue raised as to the existence of the act or fact by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person, on the subsequent trial of a suit *in rem* by the United States, where as against him, the existence of the same act or fact is the matter in issue as a cause for the forfeiture of the property. It is urged as a reason for not allowing such effect to the judgment, that the acquittal in the criminal case may have taken place because of the rule requiring guilt to be proved beyond a reasonable doubt, and that on the same evidence, on the question of preponderance of proof, there might be a verdict for the United States in a suit *in rem*. Nevertheless, the fact or act has been put to issue, and determined against the United States, and all that is imposed by the statute as a consequence of guilt is a punishment thereof. There can be no new trial of the criminal prosecution after the acquittal in it, and a subsequent trial of the civil suit amounts to the same thing with a difference only in the consequences following a judgment adverse to the claimant. The judgment of acquittal in the criminal proceedings ascertained that the facts which were a basis of that proceeding and are a basis of this one and which are made by the statute the foun-

dation of any punishment, personal or pecuniary, did not exist. This was ascertained once for all between the United States and the claimant in the criminal proceedings, so that the facts cannot be again litigated between them, as the basis of any statutory punishment denounced as a consequence of the existence of the facts."

Also in the case of United States vs. McKee (4 Dill, 128; Fed. Cases No. 15688), the defendant has been indicted, convicted and punished for having conspired with certain distillers in violation of the Revised Statutes of the United States to defraud the United States by unlawfully removing distilled spirits without the payment of taxes thereon. He was afterwards sued in a civil action by the United States under another section of the Revised Statutes to recover a penalty given thereby of double the amount of the taxes caused by such conspiracy and fraud. The transaction giving rise to the criminal prosecution and punishment and the liability to the penalty were the same. It was held that the suit for the penalty was barred by the criminal trial, conviction and punishment, as defendant could not be twice punished for the same offense. This case is cited and approved in Coffee vs. the United States *(supra)* at Page 687, 29 Law Ed.

"Where defendant was acquitted in a criminal prosecution of causing to be transported certain casks containing bottled beer, falsely marked, as containing bottled soda water such acquittal was a bar to the subsequent main-

tainance of an action by the United States to forfeit the property and recover a penalty for the same acts imposed by Revised Statute 3449."

U. S. vs. Seattle Brewing and Malting Company, 135 Fed. 597.

"We are also clearly of the opinion that proceedings instituted for the purpose of declaring a forfeiture of a man's property by reason of the offenses committed by him, though they may be civil in form are in their nature criminal. These are the penalties affixed to the criminal acts and the forfeiture sought by this suit being one of them. The information though actually a civil proceeding is in substance and effect a criminal one."

Boyd vs. United States, 29 Law Ed. Page 746.

"The right of the United States to seize and forfeit the distilled spirits is because they are brought in in violation of law, and the right if it exists to seize and forfeit the instrumentalities used by the wrong doer in bringing in such merchandise, contrary to law, must be based on the fact that they are used in commission of an offense against the United States. *If the offense has not been committed then there can be no right of seizure of forfeiture.* In the cases of offending against the act of August 10th, 1917, no revenue is to be collected, and the offense of bringing in distilled spirits is made a crime and the act itself denounces the penalty. Having been indicted and fined or imprisoned, one or both the defendant has answered to the defense and a proceeding in its nature criminal, to take the property, especially the instrumentalities used, is a proceeding not against such property alone but against the offender, and an attempt to take and forfeit

his property not because the United States has any interest in it, but for the alleged reason, he used it, as an instrumentality in the commission of the crime, and, as to the spirits themselves, it is a taking and a forfeiture to the United States because of their being in the United States contrary to law."

In re: Food Conservation Act, 254 Fed. 893.
U. S. vs. A Lot of Precious Stones, 134 Fed. 61.
U. S. vs. One Distillery, 43 Fed. 846.

The lower Court suggests that the appellant cannot abide by the decision in Coffee vs. U. S. *(Supra)* and the other cases approving the same doctrine because of the fact that in this action there is neither identity of issues or parties and that the only fact that is conclusively proven in the criminal action was the fact that Noble was not guilty beyond reasonable doubt of any offenses therein charged, therefore neither *res-adjudicata* nor twice in jeopardy, flows or accrues from said trial, citing the following cases:

Chantangee vs. Abarea, 218 U. S. 481-483.
Morgan vs. Davis, 237 U. S. 640.
U. S. vs. One Cole Auto, 273 Fed. 936.

The first case of Chantangee vs. Abarea holds that a civil action for indemnification for the damages resulting from a malicious burning of a store house or its contents cannot be maintained in the Philippine Courts where there has been a judgment of acquittal against the same

defendant for the same malicious burning in view of the positive legislation in the Philippine Codes, civil and criminal, drawing a distinction between civil liability which results from mere negligence of defendant, and otherwise. Certainly this would not tend to support the contention raised in the Judge's statement and if the Court sought to support its conclusions by the dicta in the above mentioned case we would call the Court's attention to Page 1119, of 54 L. E. of said case which quotes Justice Harlan as he reviewed the application of the Coffee case in Stone vs. United States, 42 Law Ed. 127, as follows:

> "In the present case the action against Stone is purely civil. It depends entirely upon the ownership of certain personal property. The rule established in Coffee's case can have no application in the civil case not involving any question of criminal intent or a forfeiture for prohibited acts, but turning wholly upon an issue as to the ownership of the property. In the criminal case the government sought to punish a criminal offense, while in the civil case it only seeks in its capacity as owner of property illegally converted to recover its value."

What clearer statement of law can be made than that above cited. Certainly the government is not bringing this action as the owner of the Studebaker car and claiming that Zuckerman illegally converted it. The government never once contended but that Zuckerman owned the car and the only reason they brought

this action was to punish a criminal offense; clearly not coming under the limitation to the Coffee case as applied in Stone vs. United States *(Supra)*, thus the counsel is at loss to see where the lower court can claim any support in its statement by citing the above mentioned case.

The next case cited by the lower court is that of Morgan vs. Devine, 59 L. Ed. 1153, in which case it is held that where the statute makes the stealing of postage stamps or funds and the breaking into post offices as separate crimes, and the defendants pleaded guilty to both counts, they could be sentenced to serve the penalty provided in each offense although both charges related to and grew out of one transaction. The distinguishing feature between that case and the one at hand is, that in the former there was a conviction and in the present case there was an acquittal as to all counts in the information. The acquittal would pertain as well as to one count as to the others and Noble's sole defense being that he had no liquor (See Trans. p-38), the acquittal should have as much effect upon all counts mentioned in said information, as the confessed guilt of the two defendants in the case cited by the Court. If Noble had pleaded guilty to all counts, the Court could have sentenced him under each count with the specific penalty as provided for in each instance and set forth under Section 29 of the National Prohibition Act. However, in the case

at hand it is not a distinct or separate offense that is being tried, but simply the penalty for an offense which the Government claimed to have taken place, but which they have not proven as yet because of the fact that the Government used the same evidence to prove the penalty as they did to prove the crime, and, as they failed to prove the crime, certainly the plea of *resadjudicata* is good as a defense against the Government when they sought to prove the forfeiture for the offense under the same evidence which they sought to prove the crime. It is clear that the case cited by the Court is entirely surrounded by different facts and based upon totally different grounds from this case.

The next case cited by the Court is that of the U. S. vs. One Aero Eight, 273 Fed. 936, which held that the Revised Statute Section 3450 was not repealed by the provisions of the National Prohibition Act. There is no question of *resadjudicata* raised that the counsel has been able to discover and in our opinion the case cannot be held to support the objections raised by the Court.

The other objection that is raised is the fact that Zuckerman cannot avail himself of the plea of *resadjudicata* because he was not the party to the criminal action. At the first blush this seems to be a formidable objection, but on closer examination it loses its merit. In the first place the Government did not make Charles Zucker-

man a defendant in either action nor did they claim that he had anything to do with the transportation of the intoxicating spirits in question, and so far as we are concerned in this issue at hand, we can drop the name of the defendant and intervenor because at all times Zuckerman's rights were subsequent and subserviant to those of Noble. In other words if the jury had found Noble guilty, Zuckerman would have lost his car under Section 3450 R. S. as it makes no difference how innocent the owner of the car may be.

> "There may indeed be a greater risk to the owner of the property in one form or purpose of this bailment than in others, but the wrong cannot be indicted to him by reason of the form or purpose. It is illegal use that is a material consideration, it is that which works a forfeiture, the guilt or innocence of its owner being accidental. We should regard simply the adaptability of a particular form of property to an illegal purpose, we should have to ascribe facility to an automobile as an aid to the violation of the law. It is a "thing" that can be used in removal of "goods and commodities" and the law is explicit in its condemnation of such things."
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> Goldsmith, Jr., Grant Co. vs. U. S. 65 Law Ed. 376.

It is the illegal use that is a material consideration and it is that which works a forfeiture of the article, the guilt or innocence of its owner being accidental. It would indeed be a strange rule of law that states that if a man be convicted of transporting distilled spirits, the owner

of the car shall lose the same, innocent as the owner may be of violating any laws, and, then turn about and state that the owner of the car cannot now come in and set up the acquittal of the person criminally charged and have the benefit of the same, because the owner was not a party to both actions, especially in view of the fact that the same evidence for the forfeiture of the car and in the criminal action were one and the same. The parties in the case so far as the libelees were concerned are the same in both actions, that is, Harvey Noble was defendant in the criminal action and in the proceeding *in rem* Harvey Noble, Studebaker Car and Accessories, were libelees, so that the contention and supposition raised by the lower court is without merit and the Coffee case *(Supra)* should be construed so as to allow the defendant and intervenor the benefit of the acquittal of Harvey Noble in the criminal action, under the rulings therein stated that they were the same parties in both actions. In further support of the plea of *res adjudicata* we cite U. S. vs. Openheimer 61 Law Ed. 161.

> "Where a criminal charge has been adjudicated by a court having jurisdiction to hear and determine it, that adjudication whether it takes the form of an acquittal or conviction, is final as to the matter adjudicated upon, and may be pleaded in bar to any subsequent prosecution for the same offense. In this respect the criminal law is in unison with that which prevails in civil proceedings."

Queen vs. Miles 24 Q. B. D. 423;
U. S. vs. Salen 244 Fed. 296;
Sierra vs. U. S. 233 Fed. 37.

The statement made by the lower court that the only thing that is conclusively proven in the former trial is that Noble was not guilty beyond a reasonable doubt of any offenses there charged is clearly contrary to the Coffee vs. United States *(Supra)* wherein it is stated as follows:

> "It is urged as a reason for not allowing such effect to the judgment that the acquittal of a criminal action may have taken place because of the rule requiring the guilt to be proven beyond a reasonable doubt and that on the same evidence, on the question of the preponderance proof there might be a verdict for the United States in the suit *in rem*. Nevertheless the fact or act has been put to issue and determined against the United States and all that is imposed by the statute as a consequence of guilt is a punishment thereof."

It has been further urged that these two cases are in fact different character of offenses, in other words Noble might have had a permit and yet be transporting or removing it with intent to defraud the United States of a tax. It is not to be questioned that if the latter part of the statement was true that the plea of *res adjudicata* would be without merit as Noble would be entitled to an acquittal in the criminal action if he showed that he had a permit and yet that would not relieve him of the payment of taxes

to the United States and the car would be entitled to be forfeited. But such is not the case in hand as can be seen from the Transcript (page 66).

> "The Court: I am reminded from the argument of the Government the Court told the jury that the vital matter in the case was whether or not there was any liquor in the car of Noble; that if there was there wasn't much doubt as to his guilt, if there was not in the jury's judgment, of course, there would be a verdict of not guilty. The jury found not guilty. Now the question is tentatively, whether or not the finding of not guilty does not involve the finding that there was nothing in the car, and, to that extent makes it a matter once tried not to be tried again—*res adjudicata*. . . . If we give the jury the benefit of an honest judgment, and we must, didn't they find that there was no liquor in that car, and, if they did, is it settled once for all so far as this case is concerned."?

Again see Transcript (page 68):

> "That in the former trial the plaintiff presented evidence tending to prove that Noble possessed and transported the liquor in circumstances of no permit had and no record made, and that Noble's defense in the former was not that he had a permit or made a record but that he neither possessed or transported any liquor."

Bound by these statements it cannot be said that in view of Noble's defense, that he could be not guilty of all the offenses with which he was charged in the criminal action and yet be guilty in the present case of transporting liquor with the intent to defraud the United States of the

taxes due on it, especially in view of the fact that the Government did not produce any additional evidence showing that he had liquor in his possession in this car, but relied upon the same evidence that was had in the criminal action; not granting the contention of the Government that they were not bound by the acquittal in the criminal action, and, in view of the further fact that the present action is simply a penalty following and dependent upon Noble's guilt in the criminal action and not a totally different case, thus it seems clear that the plea of *res adjudicata* should not be denied.

The only other possible contention that could be raised that the plea of *res adjudicata* could have no merit would be because of the fact that the criminal action was brought under the National Prohibition Act while this action was brought under the Internal Revenue Laws. Granting that the government has a right to do this, although it is the contention of the appellant that it does not have this right, it would seem apparent that the plea of *res adjudicata* would avail the appellant even under these circumstances. For, in order to defraud the United States the taxes due it upon distilled liquors as provided under the Internal Revenue Act, it must be shown that the claimant of the property had distilled spirits in the car upon which a tax was due the United States. That is the basic fact, for without any distilled spirits

in the possession of the claimant there can be no taxes due the Government, not only is it a basic fact in the action of *rem* under Section 3450 of the Internal Revenue Laws, but it was also the basic fact under the criminal proceedings for it was apparent from the Court's instructions that the sole question in that case was whether or not Noble had any distilled spirits in his car.

Assuming but not granting the contention as the Court does in the case of United States vs. One Essex Touring Car, 266 Fed. 138, that the Volstead Act does not repeal Section 3450 of the Internal Revenue Laws as is also held in the case of United States vs. One Cole Aero Eight *(Supra)* where the Court says on this point as follows:

> "Hence Section 25 does not repeal Section 3450 no more than a previous Statute (R. S. 3296 Com. St. 6038), which was also enacted subsequent to Section 3450 and is also broad enough to include the latter elements and the conclusion is that Section 3450 is 'existing law' within the language and intent of Section 35 of this Act."

So it can be said in view of the language of these cases that the National Prohibition Act is broad enough to include Section 3450 and that the latter is a necessary complement to it, in other words the Statutes are not wholly inconsistent with one another but both deal with the same subject matter. While different evidence might be required to convict under the two

statutes, yet nevertheless they deal with the same offense, namely having distilled spirits, and, in this respect under either of the two Statutes it must be shown that Harvey Noble had distilled spirits with him when the car seized. As the Government failed to prove in the criminal action that Harvey Noble had distilled spirits in the car, we think that the Court was bound by the jury's decision in that action. The question whether or not a tax has been paid on the liquor is without merit unless it can be shown that the claimant had distilled spirits in the car, and, this the Government has surely failed to do and is bound by the verdict of the jury on that point.

The Government has been accustomed to bring the action for the forfeiture of these cars under Section 3450 of the Internal Revenue Laws simply for the reason that it was easy to obtain a forfeiture of cars under this section as no liens are recognized and, the section also provides for the forfeiture of cars under different offenses besides the transportation of distilled spirits with tax unpaid; while the Volstead Act simply provides for the forfeiture for the one offense of transportation without a permit, and also recognizes liens in the way of mortgages. Thus, the government has a much wider range under Section 3450. Allowing the Government to do this shows what the Courts have clearly recognized that the two Statutes

are interwoven, and it seems to the counsel for the appellant that the language of Coffee vs. the United States *(Supra)* would apply under the circumstances in this case as clearly as though both actions were brought under the Internal Revenue Laws. The Government has the burden of proof of showing that there were distilled spirits in the car and until that is shown the burden is not on a claimant to show that the tax has been paid, and, a mere libel filed on the part of the Government against the car is wholly insufficient without further proof on its part.

II.

That the Court erred in holding that the said Big Six Studebaker Automobile and Accessories were subject to confiscation in the above-entitled case under the Internal Revenue Laws and that Section 26 of the Volstead Act did not repeal Section 3450, of the Internal Revenue Laws, Errors, 6, 7, and 8.

The information in the criminal action against Harvey Noble was filed under the National Prohibition Act charging him with transporting liquor without a permit or making a record thereof in violation of Sections 6 and 10, respectively, of said act. Section 26 provides for the specific method of forfeiture of any vehicle seized in the act of transporting distilled spirits. Section 3450 of the Internal Revenue Laws deals generally and covers goods and

commodities of all kinds upon which there is a tax due and provides for the forfeiture of all articles which contained said commodities either in the manufacturing of the same or which are used in the removal or concealment of said goods. The question arising necessarily as to whether or not Section 26 of the National Prohibition Act repealed Section 3450 at least to the seizure of vehicles which are used in transporting and confiscating liquors certainly seems to the counsel for the appellant to be repealed at least to this extent. The case of United States vs. One Haynes Automobile, 274 Fed. 926, decided by the Circuit Court of Appeals of the Fifth Circuit is on all fours with the contention of the appellant, the Court holding that Section 3450 was repealed by Section 26 of the Volstead Act. The facts of that case are directly in point with the issues at hand, except there appears to be no acquittal obtained by person charged in the criminal action, but it is stated that the acts charged to constitute the violation of law are alleged to have occurred since the Volstead Act took effect. The Court saying:

> "It is evident that the tax, which is claimed has not been paid, is the double tax and penalty directed by Section 35 of the Volstead Act. Any manufacture, sale, or transportation of liquor for nonbeverage purposes to be legal, must be under a permit as provided by the Volstead Act. The transportation of liquor is clearly one, which if illegal, would

> violate the Volstead Act, and would subject the vehicle to forfeiture according to the provisions of that act. It is not, therefore, to be assumed that Congress intended to provide for the forfeiture of vehicles under Section 26 of the Volstead Act, with its provisions for preserving the rights of third parties, and, still leave them subject to be forfeited under the more drastic provision of Revised Statutes 3450."

As the grounds upon which the libel of the Government is based is that the automobile seized was used in the removal of distilled spirits upon which there was a tax due and assuming that there was liquor in the car, the tax due to the United States on the same, would be the customs duty since the liquor was made outside of this country, it being Sandy MacDonald Scotch Whiskey and James Burrough Limited Dry Gin (See Trans. p.-61-62). When the various Federal Statutes herein involved governing the enforcement of a customs law passed by Congress, the importation of intoxicating liquors for beverage purposes into the United States was lawful, and, the only object of the Statutes were to protect the revenue by providing a method for the collection of duty imposed upon merchandise including such intoxicating liquors so imported.

The enactment of the Volstead Act marked a complete departure by the Government from its former policies with respect to the importation of intoxicating liquors for beverage purposes.

By that Act such importation for such purposes were absolutely forbidden. It is clear, therefore, that thereafter there could be no intoxicating liquors imported for beverage purposes on which any customs duty should be paid. It follows that any Statute then in force providing for such payment or entry, together with any Statutes imposing or prescribing the mode of enforcing penalties for the failure to make such payment of entry were thus repealed by necessary implication.

U. S. vs. One Packard Motor Truck 284 Fed. 394;
U. S. vs. 2000 Cases, etc. 277 Fed. 410, C. C. A. 4th;
Ketchum vs. U. S. 270 Fed. 416, C. C. A. 8th;
Read vs. Thurmond 269 Fed. 252, C. C. A. 4th;
U. S. vs. Yungenovich 65 Law Ed. 1043;
U. S. vs. One Paige Automobile 277 Fed. 524.

Furthermore aside from the Volstead Act and even if the custom laws regulating the importation of intoxicating liquors for beverage purposes were not repealed by that Act, the same result would follow from the inconsistency between such custom laws and the Eighteenth Amendment of the Federal Constitution prohibiting the importation of intoxicating liquors into the United States for beverage purposes. Regardless of the other considerations, as the law referred to, impliedly recognized and as-

sumed as legality of such importation when accompanied by compliance of regulations thereby prescribed, every such statute, if attempted to be applied to the importation of beverage intoxicating liquors is clearly unconstitutional and void.

It no doubt will be contended by the Government that the presence of intent to defraud as under Section 3450 of the I. R. L. and the absence of that intent under Section 26 of the Volstead Act, prevents an implied repeal. Yet in the Yungenovich case (Supra) Section 3257 was held repealed. That section provided punishment for a distiller who attempted to defraud the Revenue Laws. The comparable section of the National Prohibition Act punished a distiller regardless of his intent and provided a lessor punishment. We can see no possible distinction, in this respect, between the comparison made by the Supreme Court of a Statute directed against these distillers who attempted to defraud the Revenue Laws with a later Statute against all distillers; and the comparison here to be made of a Statute against those who transport with intent to defraud the Revenue Laws and a later Statute against all who transport. This distinction as to intent to defraud the Revenue Laws, did not preserve Section 3257, and it cannot preserve Section 3450 in that extent to which 3450, is subject to the same fatal comparison. The contention that

Section 3450 punishes by forfeiture in all cases, and Section 26 punishes only in case there is specific arrest and conviction for an underlying offense, we think is a distinction without a difference. The fact that the second Statute covers the same act and provides a smaller penalty leads to the conclusion of an implied repeal; so when the second Statute covers the same act as a reason for confiscation, but provides some exemptions from condemnation we have a complete analogy to a lesser penalty. When we have a statute complete in itself which makes a doing of certain prohibited acts therein specified a crime, and, such statute also prescribes the punishment to be inflicted in case of violation, and, such statute makes no reference to other statutes, it is going far to say that we may go to some other prior statute which in general language provides for the forfeiture to the United States of all instrumentalities used in the commission of offenses of that character.

The Goodhope 268 Fed. 694;
In Re Food Conservation Act (Supra);
U. S. vs. One Ford Automobile 262 Fed. 374;
Reo Atlanta Company vs. Stern 279 Fed. 423;
Reed vs. Thermond (Supra);
U. S. vs. One Haynes Automobile (Supra);
U. S. vs. Windham 264 Fed. 376.

If the forfeiture is in force it is in nature of and in fact amounts to the imposition of an added punishment not found in or provided for in the statute which makes a doing of prohibited act a crime and which also specifies punishment to be inflicted in case of violation. So far as the punishment for violation of laws is concerned it must be presumed the one prescribed in the statute is the only one exclusive of all others, and, a punishment prescribed in other statutes, even a general one, for bringing in merchandise contrary to law cannot be resorted to.

U. S. vs. Dowling 278 Fed. 630;
In Re: Food Conservation Act (Supra);
U. S. vs. One Ford Automobile 262 Fed. 374;
U. S. vs. 90 Demijohns Case No. 15887, 27 Fed. Cases 167;
Bags of Sugar Case No. 14324, 24 Fed. Cases 505;
U. S. vs. Puhac 268 Fed. 392.

The case of Lewis vs. U. S., 280 Fed. 5, C. C. A. Sixth, is on all fours with the case in hand and holds in a very able opinion by said Court that Section 3450 of the Internal Revenue Laws is superseded by the National Prohibition Act so far as the vehicles used in transportation or concealing intoxicating liquors manufactured and intended for beverage purposes are concerned, The Court saying:

"By the system existing when Section 3450

was adopted it was contemplated that a specific tax was levied by the law upon all distilled spirits, and, that this tax must be paid by attaching to the container advanced paid Revenue stamps, with which it was a duty of every manufacturer to provide himself. The whole system, the automatic imposition of the tax and the advanced or simultaneous payment therefor, was abolished by the new law. Stamps were expressly forbidden, and, so far as we observed no other payment of tax was provided if the liquor was for beverage purposes.

"It is not easy to see how a duty to pay a tax can arise if there is no way in which it can be paid and no officer authorized to receive it; nor how, lacking any law which makes it a duty to pay, there can be an intent to defraud the law by not paying, or by acts which would be an aid of an intent not to pay. The only tax which is now ever imposed against such liquor, and is also made payable, is that double tax which the collector specifically assess in any case where evidence of an unlawful manufacturer comes to his notice. The very provision that he shall assess a double tax may be said to imply that one-half of it is in place of that original tax which would have accrued under the old law, but which never had accrued under the new, and which therefor must be specifically levied. Of course, after such an assessment there could be an intent to defraud the United States out of such tax; but that case is not before us. Without doubt the power to tax illicit liquor in spite of the absolute prohibition against the manufacture continues unimpaired; but the actual existence of any such tax until it is specifically assessed may well be thought to be inconsistent with the abolition of all existing methods

of payment and the substitution of no other method."

Again in the case of United States vs. Two Thousand Cases, etc. 277 Fed. 410, The Court says:

> "The Congress, if it had so desired could have taxed prohibited liquor and the Supreme Court has so stated . . . . the question here, therefore, is not one of the power but of legislative intent . . . . We are satisfied that the National Prohibition Act was not intended as a taxing measure in respect of intoxicating liquors for beverage purposes, but being a comprehensive statute intended to prevent the manufacture and sale of intoxicating liquors for beverage purposes, it has erected its own machinery to accomplish the desired results."

This Court has held in Farley vs. United States 269 Fed. 721 that the National Prohibition Act covered the whole field of carrying on the business of a retail liquor dealer and therefore repealed the earlier Internal Revenue Law punishing for carrying on this business without paying a tax, and this in spite of the provisions of Section 35. The reason for the conclusion was that the entire subject matter of criminal liability for the manufacturer or traffic in intoxicants was covered by the latter Statute with penalties different from those obtaining under the old Statute, the Court saying:

> "As we have seen the Prohibition Act by the third Section of title two inhibits in the most comprehensive terms possible the manu-

facture of or traffic in intoxicating liquors except as authorized by the act and an infraction of its mandate in this respect is rendered criminal by Section 29 so that here we find the entire subject matter of criminal liability for such manufacture or traffic in intoxicants covered by the latter Statute and with different penalties from those obtaining under the old Statute.

"Section 35.—The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor, or relieve anyone from criminal liability nor shall this act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws.

"This amounts to a saving clause for the prosecution under previous Statutes of offenses committed prior to the time the present act became effective. Subsequently thereto, the 'existing laws' applicable are obviously those established by the prohibition act, especially where inconsistent with or repugnant to prior Statutes relating to the subject."

With our own circuit court holding this general view of the prohibition act regarding its effect upon existent laws, it seems clear that this view would support the contention of the appellant regarding Section 3450 of the Internal Revenue Laws that this action should have been brought under Section 26 of the Prohibition Act, if at all, and appellant's contention being further supported by the Circuit Court of Appeals in the 2nd, 4th, 5th, 6th, 7th and 8th Districts as shown by the cases cited (Supra).

III.

Discussing errors nine, ten and eleven to the

effect that the court erred in not holding that the liquor, if any, was of foreign manufacture and therefore, not taxable under title three of the prohibition act.

According to the testimony in the case the distilled spirits involved were manufactured outside of the United States (See Trans. p. 61 and 62). That being so, there clearly could be no tax due to the government under the theory that they might have been manufactured in the United States before the prohibition act went into effect, and, therefore taxable under the Internal Revenue Laws because first, the labels on the bottles showed conclusively as to the place where it was manufactured, the whiskey in Scotland, and the gin in England, respectively, second because of the long space of time between the date as to when the Prohibition Act was passed and the time when this action was filed. On this basis the case of Payne vs. United States 279 Fed. 112 can be distinguished, in which it was held that the transportation occurring only a few days after the National Prohibition Act took effect and there being nothing to indicate, but that the taxes might have been due upon the distilled spirits at the time that the said act went into effect, and, it not appearing but that they might have been manufactured in an industrial plant and taxable under title three of that act, and therefore, Section 3450 of the Internal Revenue Laws could

be invoked to cause the forfeiture of the car.

Here the Court finds that the alleged whiskey and gin was of foreign manufacture and the space of time after the National Prohibition Act was effective, tends to indicate conclusively that these distilled spirits could not have been in the country at the time that the said act went into operation, and therefore, there could not be any taxes due upon it under the Internal Revenue Laws. The labels on the bottles show conclusively that it could not have been manufactured in this country so as to have been taxable under title three of the Prohibition Act which would allow the Government to invoke the aid of Section 3450 of the Internal Revenue Laws in obtaining forfeiture of the vehicle used. In the light of the most favorable angle contended for by the government it can only be said that this seizure arose under the National Prohibition Act, and therefore, the Government has no right to invoke the aid of Section 3450 of the Internal Revenue Laws, but instead should have brought this libel under the Prohibition Act; that being true the acquittal of the defendant, Harvey Noble, is conclusive under Section 26 of the said National Prohibition Act to cause the car to be returned to him by the Government.

Wherefore, appellant respectfully submits that the judgment of the District Court be re-

versed and that the car seized in this action be returned to its true owner and claimant, Charles Zuckerman,

FREEMAN, THELEN & FRARY,
Solicitors for Intervenor and Appellant.